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Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 124.

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122; PHIL L. VALLEY, JOHN ALEXANDER and JACK HEISDORF, Each Individually, as Business Agent, Organizer and Vice-President, Respectively, for, and as Representatives of, All the Members of Hotel & Restaurant Employees' International Alliance No. 122;

INTERNATIONAL LAUNDRY WORKERS, LOCAL NO. 174;

BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL NO. 64, Sometimes Known as International Bartenders and Beverage Dispensers, Local No. 64;

INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL NO. 311;

MILWAUKEE BUILDING TRADES COUNCIL;

All Affiliated With the American Federation of Labor,
Petitioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, Individually and as Chairman of, L. E. GOODING, Individually and as a Member of, R. FLOYD GREEN, Individually and as a Member of, The Wisconsin Employment Relations Board;

PLANKINTON HOUSE COMPANY, a Corporation,
Respondents and Appellees.

PETITIONERS' BRIEF.

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PLANKINTON HOUSE COMPANY, a Corporation,
Respondents and Appellees.

PETITIONERS' BRIEF.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Wisconsin is reported in 236 Wis. 329, 294 N. W. 632, and 295 N. W. 634 (decision on motion for rehearing).

The decision is set forth in the "Petition for Writ of Certiorari and Brief in Support Thereof" at pages 38 through 59. It is, therefore, not set forth in this brief.

JURISDICTION.

Jurisdiction of this Court is invoked under the provisions of the Act of Congress of February 13, 1935, Section 347B, 28 U. S. C. A., Section 344-B, giving jurisdiction to this court

> "to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by appeal any cause wherein a final judgment or decree has been rendered and passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any state on the ground of being repugnant to the Constitution or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution. * * *"

This case is one in which the validity of the Statutes of the State of Wisconsin, to wit, Section 111.01 through 111.19, Wisconsin Statutes 1939, particularly Section 111.06 (2) (e) thereof, and an order and enforcing judgment based thereon, is drawn in question upon the ground that such statutes, order and judgment, on their face and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, as depriving the petitioners of liberty or property without due process of law, denying to the petitioners the equal protection of the laws, and, more particularly, denying to the petitioners the constitutionally-secured right of freedom of speech. The decision of the Wisconsin Supreme Court was in favor of the validity of the statute, order and judgment.

The petitioning unions alleged and argued before the

Wisconsin Employment Relations Board (R. 77-80), before the Circuit Court for Milwaukee County (R. 2-6), and before the Supreme Court of the State of Wisconsin (see decision, Supp. R. 53), that Section 111.06 (2) (e) of the Wisconsin Statutes and the order of the Board were unconstitutional, void, and of no effect whatsoever because they were repugnant to the Fourteenth Amendment to the Constitution of the United States, as depriving petitioners (1) of freedom of speech and assembly, (2) of the equal protection of the laws, and (3) of liberty and property, without due process of law.[1]

The federal question of whether the Wisconsin Statutes in question and the order of the Board based on such statutes violated the Constitution of the United States thus was raised before every tribunal in which the proceeding was tried, heard and argued.

The Supreme Court of Wisconsin specifically held that neither the statute nor the order nor the enforcing judgment deprived petitioners of any rights guaranteed under the Fourteenth Amendment to the Constitution of the United States, the Court stating:

"We discover no invasion of the right of free

---

[1] Under the Wisconsin Supreme Court practice errors are assigned in the brief. In the brief of petitioners herein, appellants before the Wisconsin Supreme Court, under the title "Errors Assigned" (pages 24, 25), it is specifically set forth as follows:

"(1) The Circuit Court for Milwaukee County erred in affirming that order of the Wisconsin Employment Relations Board requiring the appellant unions, their officers, members, agents, successors and assigns, to cease and desist from engaging in, promoting or inducing picketing at or near the Plankinton House or Kilbourn Hotel and from boycotting in any way the Plankinton House for the reason that:

"(a) Section 111.06 (2) (e), upon which such order is based, is unconstitutional, void and of no effect whatsoever, being contrary to the Fourteenth Amendment to the Constitution of the United States and Article I of the Constitution of the State of Wisconsin.

"(b) Such order deprives the unions, their officers, members and agents from exercising the constitutional rights of freedom of speech, press and assemblage, guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I of the Constitution of the State of Wisconsin."

speech either in sub. (2) (e) 111.06, Stats. 1939, or in the way the law was administered by the Board in this case" (Supp. R. 64).

While the principal decision of the Wisconsin Supreme Court, together with the decision on petition for rehearing, are in some respects somewhat difficult to fathom, the following is clear:

1. The federal question of whether a requirement that the majority of employees in a bargaining unit must authorize a strike before peaceful picketing and boycotting pursuant thereto can be permitted[2] violates the Fourteenth Amendment, either because it deprives of the right to free speech or because it denies the equal protection of the laws, was passed upon in favor of its validity in the principal decision (Supp. R. 59); and

2. In both decisions the federal question of whether the order and the enforcing judgment prohibiting all picketing and all boycotting, either as predicated upon the statute or as predicated on the facts and circumstances of the case, violated the Fourteenth Amendment, was determined in favor of its validity (Supp. R. 64 and 69).

STATEMENT OF THE CASE.

(Reference to the Supplementary Record—Supp. R.—refers to the record printed by the clerk of this court as distinguished from the printed record used in the court below.)

The Plankinton House Company is a Wisconsin corpora-

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[2] Section 111.06 (2) (e), Wisconsin Statutes 1939, provides:

"(2) It shall be an unfair labor practice for an employee individually or in concert with others: * * * (e) to co-operate in engaging in, promoting, or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

tion, engaged in the general hotel business, and operating the Plankinton House and the Kilbourn Hotel in the City of Milwaukee, Wisconsin (R. 251).

The Plankinton House Company employed approximately 160 employees eligible to membership in the petitioning unions (Exhibit 42), all of which employees were required to become and remain members of such unions pursuant to an all-union agreement entered into between the company and such unions. The unions and the hotel company entered into such written agreement on or about June 16, 1938, covering the terms and conditions of employment of the employees of the company, and recognizing the unions as the exclusive bargaining agents for such employees (R. 252).

On May 15, 1939, pursuant to a specific clause in such agreement, permitting the continuation thereof after revision, the unions gave notice to the company that they desired to continue the contract, but also desired to negotiate changes therein to become effective for the coming year. The company likewise served notice of proposed changes (R. 253-254).

Upon the inability of the parties to agree upon such proposed changes the matter was submitted to an arbitration board, as provided for by the agreement. The arbitration award was unsatisfactory to the unions. **The contract provided that if either party was dissatisfied with the award the right to strike or lockout was available** (R. 253, Exhibit 1). Therefore, pursuant to the contract, a strike was called of the employees, **most** of the employees of the hotels responding to the strike call (R. 253-256).

No secret vote was held amongst the employees prior to the strike (R. 256), contrary to the provisions of the "Peace Act," Section 111.06 (2) (e) thereof, providing:

"(2) It shall be an unfair labor practice for an em-

ployee individually or in concert with others: * * *
(c) To co-operate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

The unions engaged in picketing the entrances to the Plankinton House and the Kilbourn Hotel, and carried banners advising the public of the strike. During the early days of the strike there were some instances of disorder on the picket line consisting in all of six simple assaults and two instances of delivery stoppage, all occurring on four days in the period between November 4 and November 17, 1939 (R. 257-259)."

The Plankinton Hotel Company complained to the Wisconsin Employment Relations Board, charging the petitioning unions, their officers, agents, and members, with having committed unfair labor practices by engaging in the concomitants of a strike although a majority of the employees had not first voted by secret ballot to call such strike, and praying that their picketing activities be restrained and enjoined (R. 58).

Petitioners answered and in their answer challenged the constitutionality of the legislation under which the jurisdiction of the Board was invoked (R. 70).

After a hearing and the taking of evidence, the Wisconsin Employment Relations Board, on February 15, 1940, made its findings of fact and conclusions of law and entered an order restraining the unions, their officers, agents, successors, and assigns, from

"(a) Engaging in, promoting, or inducing picketing at or near the Plankinton House, or the Kilbourn Hotel;

"(b) Attempting to hinder or prevent by threats,

intimidation, force or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company;

"(c) Boycotting in any way the Plankinton House Company" (R. 251-262).

The reasons for this order were stated by the Board, both in its Conclusions of Law and Decision, to be as follows: The respondent unions were **"guilty of unfair labor practices by co-operating and engaging in promoting and inducing picketing and boycotting, all being overt concomitants of a strike, without first obtaining the approval of the majority of the employees of the Plankinton House Company by a secret ballot."** The employees who went out on strike and who remained out on strike were found to have been "parties to an unfair labor practice by co-operating and engaging in a strike without first obtaining the approval of a majority of such employees." (Conclusions of Law Nos. 2 and 3, R. 259-260, R. 267-268.)

Pursuant to the method for appeal provided in the statute [Sec. 111.07 (8)], the petitioning unions sought review and the setting aside of such order in the Circuit Court of Milwaukee County, Wisconsin, by petition which alleged in part that the order of the Board and the act on which the order was based were unconstitutional and void as being repugnant to the Fourteenth Amendment to the United States Constitution (R. 2-6). The Board cross petitioned for enforcement (R. 6). The Plankinton House Company, upon petition, was permitted to intervene as a party (R. 11). The Circuit Court affirmed, sustained and enforced the Board's order in its entirety by decision (R. 12-47), and by appropriate decree (R. 47-51), violation of which would be punishable by contempt.

The petitioning union then appealed to the Supreme Court of the State of Wisconsin, again raising on appeal the constitutional questions as aforesaid (R. 53). The

Supreme Court affirmed the judgment of the Circuit Court for Milwaukee County on November 8, 1940, and upheld the Board's order prohibiting all picketing and boycotting (R. 64).

Motion for rehearing was made and was denied by the Wisconsin Supreme Court on January 7, 1940, in a supplemental decision (R. 65 and 69).

In its principal decision the Court found that the "Act" did not violate any constitutional prohibitions, specifically finding that the majority-minority classification was a valid one, attempting to distinguish the decisions of this Court in the **Thornhill** and **Carlson** cases on the grounds, among other things, that the law regulates concert of action rather than bans individual rights.

SPECIFICATION OF ERRORS.

The Supreme Court of the State of Wisconsin erred in the following respects:

1. In holding that Section 111.06 (2) (e), Statutes 1939, was not violative of the Fourteenth Amendment to the Constitution of the United States.

2. In sustaining those portions of the judgment of the Circuit Court for Milwaukee County, Wisconsin, enforcing the order of the Wisconsin Employment Relations Board which provided that your petitioners

> "(1) Immediately cease and desist from
>
> "(a) Engaging in, promoting, or inducing picketing at or near the Plankinton House, or the Kilbourn Hotel;
>
> "(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company;
>
> "(c) Boycotting in any way the Plankinton House Company."

3. In sustaining the order so as to prohibit peaceful activities unattended by violence, disorder, or breach of the peace, which activities were intended to make known the facts of the controversy between employees and employers, and between one group of employees on the one hand and another group of employees on the other hand.

With respect to the second error above specified it is the position of petitioners that such order and judgment, whether based upon statute or upon any purported holding that the right to picket or boycott has been forfeited be-

cause of the facts and circumstances established by the record respecting alleged violence, consisting of a few isolated instances of simple assault, deprives the petitioners of the privileges or immunities of citizens of the United States; deprives your petitioners of life, liberty and property without due process of law; and denies to your petitioners equal protection of the law, all in violation of the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT.

Pages

I. Legislative history of Wisconsin labor laws and summary analysis of Chapter 57, Laws of 1939 18-22

Although the State of Wisconsin in 1919 enacted into law Section 20 of the Clayton Act, and in 1931 anticipated the Norris-LaGuardia Act by one year, by enacting the Labor Code identical with the Norris-LaGuardia Act, and in 1937 enacted a Little Wagner Act, patterned directly after the National Labor Relations Act, the reactionary legislature of 1939 sought to wipe all those statutes off the books by enacting Chapter 111, which is now before this Court for its consideration. Examination of Chapter 111 will disclose that it represents an effort on the part of the Wisconsin Legislature to circumvent the opinions of this Court in the cases of **Lauf v. Shinners**, 303 U. S. 323; **New Negro Alliance v. Sanitary Grocery Company, Inc.**, 303 U. S. 552, and **Senn v. Tile Layers' Union**, 222 Wis. 383, affirmed 301 U. S. 468, and, further, that it sought to enact into law the repudiated doctrines of the cases of **Duplex Co. v. Deering**, 254 U. S. 433, and **Bedford Cut Stone Company v. Journeymen Stone Cutters' Association**, 274 U. S. 37.

Chapter 111, Wisconsin Statutes 1939, is not in any sense of the term an "Employment Peace Act," but is an act which seeks to impose involuntary servitude upon the workers of the state. It deprives such workers of the rights which are assured to them by the Fourteenth Amendment to the Constitution of the United States, and is a bald perversion of the National Labor Relations Act.

II. Section 111.06 (2) (c), Wisconsin Statutes 1939 (Chapter 57), is unconstitutional, void and of no effect whatsoever, because it contravenes the guaranties of

free speech and equal protection of the laws afforded by the Fourteenth Amendment to the Constitution of the United States 23-38

It clearly appears from the record in these proceedings that the order of the Board is predicated upon the provisions of Section 111.06 (2) (e) of the statutes, which provides as follows:

> "(2) It shall be an unfair labor practice for an employee individually or in concert with others: * * * (e) To co-operate in engaging in, promoting, or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

In the instant case there is no question as to the legality or the purposes of the strike, but the sole question is whether or not Chapter 111, Wisconsin Statutes 1939, or any order or judgment purportedly based thereon deprive individuals or minority groups of the rights assured to them by the Fourteenth Amendment to the Constitution of the United States.

A. Section 111.06 (2) (e) unlawfully deprives petitioners of the right to freedom of speech guaranteed by the Fourteenth Amendment to the Constitution of the United States 25-33

1) "Picketing, boycotting, or any other overt concomitant of a strike," when peacefully carried on, are synonymous with the terms "free speech" and "liberty," as those terms are used in the Fourteenth Amendment to the Constitution of the United States 26-27

Decision of this Court in the cases of **Thornhill v. Alabama**, 310 U. S. 88, **Carlson v. Cali-**

fornia, 310 U. S. 106, and **American Federation of Labor v. Swing**, 61 Sup. Ct. 568, are conclusive on the point that picketing and boycotting constitute the workingman's means of communication, and are synonymous with the term "free speech," one of the rights assured to the petitioners under the Fourteenth Amendment to the Constitution of the United States.

2) Section 111.06 (2) (e) is to be tested on its face 27-29

In the case of **Thornhill v. Alabama** it was expressly held by this Court that where rights such as freedom of speech are concerned it is the statute itself which must be construed on its face rather than the accusation or the evidence under it so as to eliminate the existence of threat of censorship or prohibition of such rights.

In the instant case the Wisconsin Supreme Court ignored the caveat of the **Thornhill** case, and did not test the statute on its face.

3) Section 111.06 (2) (e) is not valid as a proper exercise of the police power of the state 29-30

The segregation of employees into minority or majority groups for the purpose of ascertaining whether or not such groups may exercise rights guaranteed under the Constitution bears no reasonable relationship to the exercise of the police power of the state, since there is no inherent danger to public property, health, safety, or morals when peaceful picketing is carried on by a minority group of employes rather than by a majority group.

4) The right to disseminate information is not limited to employer-employee relationship 30-33

Under the decision of this Court in the case of **American Federation of Labor v. Swing**

neither the state, its administrative bodies, or its courts may constitutionally limit the area of industrial dispute to the direct employer-employee relationship or to an employer-majority of employees relationship. If the law were otherwise minority groups would be prohibited from expressing their just complaints.

B. Section 111.06 (2) (e) denies equal protection of the laws 34-38

The classification into majority and minority groups of employees for the purpose of ascertaining whether or not such employees may engage in picketing, boycotting, or any other overt concomitant of a strike bears no reasonable relationship to public health, safety or morals.

Reliance upon the majority rule, as in the case of elections, is a complete disregard of the fundamental democratic proposition that those dissatisfied with the action of the majority remain free to express their opinions and criticisms, and do not forfeit their constitutional rights because they are in a minority.

Legislation of the type of Chapter 111, seeking to deprive minority groups of constitutional rights, constitutes an opening wedge to the exploitation of such minority groups, similar to that which we now find in the tragic history of European countries.

Conclusion on the constitutionality of the statute .. 38

III. The **Meadowmoor** case is inapplicable 38-51

A. That case was not the basis for the order 38-43

The order entered by the Wisconsin Employment Relations Board and enforced by the judgment of the Circuit Court for Milwaukee County and the Wisconsin Supreme Court was not based

upon any finding that the unions had engaged in such extreme and flagrant violence that the trier of fact could justifiably conclude "that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful." This is demonstrated not only by the findings of fact and conclusions of law entered by the state board, but by the action of the Circuit Court for Milwaukee County in permitting, pending the appeal to the Wisconsin Supreme Court, peaceful activities during certain hours of the day. Certainly, if the order were based upon extreme and flagrant violence so enmeshed with and indistinguishable from the peaceful activities that one could not be separated from the other, the Court would not have permitted continued peaceful activities.

The first decision of the Wisconsin Supreme Coure dealt only with the statute and was not based upon any purported application of the **Meadowmoor** case, which had not yet been decided when the Court's decision was rendered.

Under the decision of this Court in the **Meadowmoor** case the only justification for the entry of an order prohibiting all picketing and boycotting must lie in the express finding of acts of extreme violence, so enmeshed with and indistinguishable from peaceful and legitimate activities that the trier of fact can come to the reasonable conclusion that such complete ban is necessary to prevent similar acts of extreme violence in the future, and until the time that the momentum of fear generated by such violence has appreciably declined or disappeared. In the instant case there has been no such finding, nor could there be on the record.

B. The order is unsupported by the facts.....48-50

Reference to the record upon which the findings of fact of the Board are based shows no instances.

of "continuing and recurring flagrant violence" as was present in the **Meadowmoor** case.

The police officer testified that the police department "has been able to maintain order very, very adequately," and that it had "the situation very well in hand" (R. 197, 198).

We have in this case only isolated disorders and fugitive encounters occurring during the early days of the strike, and which did not recur subsequently. By no stretch of the imagination can the record be found to sustain an order prohibiting all picketing and boycotting.

C. There is no finding that the unlawful activities were authorized by or attributable to the union.....50-51

IV. The order is more comprehensive than necessary under any circumstances.....51-56

The order in the instant case bans picketing and all **boycotting**, contrary to the caveat of the **Meadowmoor** case. An injunction issued because of extreme and flagrant violence must be limited to those activities which are related to such violence, and may not include unrelated activities. The decision of the Wisconsin Supreme Court demonstrates that the order is so broad in the instant case as to include all peaceful activities regardless of whether or not such activities are related to the mild disorders which occurred.

Conclusions on the purported applicability of the **Meadowmoor** case.....54-56

V. Analysis of the decision of the Wisconsin Supreme Court.....56-78

The decision of the Wisconsin court is based upon an attempt to distinguish the **Thornhill** and **Carlson** cases on the following grounds:

1. In those cases the legislation dealt with the action of individuals. In the instant case it deals with "collective" or "concerted" activities....57-60

2. In those cases the Court had before it absolute prohibitions of the right of free speech. In the instant case such absolute prohibition to a minority is called regulation....61-63

3. In those cases the exercise of rights guaranteed by the Constitution were by legislative declaration termed "unlawful" acts, while in the instant case we are dealing with "unfair labor practices"....63-66

4. The term "picketing," as used in the **Thornhill** case, differs in meaning and scope from that term as it is used in section 111.06 (2) (c)....66-68

5. In the instant case the Legislature has not prohibited the right to strike, but has divided strikes into authorized and unauthorized activities, permitting the exercise of constitutional rights in the one case and prohibiting it in the other....68-78

There is obviously no basis for any such purported distinctions.

VI. Memorandum opinion on the motion for rehearing....78-79

ARGUMENT.

I.

LEGISLATIVE HISTORY OF WISCONSIN LABOR LAWS AND SUMMARY ANALYSIS OF CHAPTER 57, LAWS OF 1939.

In 1919 the State of Wisconsin—consistent with the tradition of that state as the cradle of liberal and progressive legislation—enacted chapter 133.07 of the statutes entitled, "Working men may organize; injunction not to restrain certain acts." This statute was the counterpart of the Federal Clayton Act, containing the famous section 20 of the act. When it subsequently became apparent that the Clayton Act did not provided the working men the protection it was designed to afford (**Duplex Co. v. Deering**, 254 U. S. 433) the Wisconsin Legislature in 1931 enacted the State Labor Code, the counterpart of the Norris-La Guardia Act, Section 103.53 through 103.63, Wisconsin Statutes. This statute was one of the first of its kind in this country, and preceded by one year the enactment of the Norris-La Guardia Act by the Congress of the United States, which sought to prevent "goverment by injunction," which neither the Sherman Anti-Trust Act nor the Clayton Act was successful in doing.

In 1937 the Wisconsin Legislature adopted what is commonly known as the "Little Wagner Act," which, with minor variations, was the counterpart of the National Labor Relations Act (Ch. 111, Wis. Stats. 1937).

Under these three different enactments the Wisconsin Legislature took the lead in securing for its residents the right to organize, to bargain collectively through their chosen representatives, and to engage in those activities which give life and vitality to those rights embraced within the statutory term "mutual aid and protection,"

and if to secure those rights the employees were obliged to strike or disseminate information by the use of the picket line, or to cease patronizing and urging others to cease patronizing the concern with which the dispute is had, such activities were likewise protected.

Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Co., 212 Wis. 623, 256 N. W. 56;
American Furniture Co. v. I. B. of T. C. S. & H. of A., 222 Wis. 338, 268 N. W. 250;
Senn v. Tile Layers' Union, 222 Wis. 383, 268 N. W. 270, affirmed 301 U. S. 468, 81 L. Ed. 1229.

In 1939, however, a reactionary Legislature and a reactionary administration sought to nullify all of these rights by repealing Chapter 111 of the Statutes of 1937 and replacing it with what was called "The Employment Peace Act," some of the sections of which are involved in the instant proceedings. The act itself is set forth in the "Petition for Writ of Certiorari and Brief in Support Thereof" at pages 59 through 77.

This same Legislature amended the Wisconsin Labor Code (protoype of the Norris-La Guardia Act) by redefining a labor dispute as

> "any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives" [Section 103.62 (3)],

and by declaring that

> "it shall be unlawful for anyone to picket, or induce others to picket, the establishment, employees, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with his business, or interfere with any person or persons desiring to transact or transacting business with him, when no labor dispute as defined in subsection (3 of Section 103.62 ex-

ists between such employer and his employees or their representatives" (Section 103.535).

Examination of the provisions of chapter 111 demonstrates that it repeals and supersedes all laws which may be in conflict therewith (Section 111.17), and that it seeks to prevent, by a majority-minority device, the exercise of certain rights which are secured by the Fourteenth Amendment to the Constitution of the United States, as interpreted by the recent decisions of this Court [Section 111.06 (2) (c)].

A labor dispute is defined under the law as being:

"any controversy between an employer and the **majority** of his employes in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives" [Section 111.02 (8)].

A secondary boycott is defined as

"combining or conspiring to cause or threaten to cause injury to one with whom no labor dispute exists; whether by (a) withholding patronage, labor, or other beneficial business intercourse, (b) picketing, (c) refusing to handle, install, use, or work on particular materials, equipment, or supplies, or (d) by any other unlawful means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another" [Section 111.02 (12)].

The act then goes on to define what are unfair labor practices on the part of employees, either individually or in concert with others.

Section 111.06 (2) (a) bars picketing of homes of employees. Section 111.06 (2) (c) bars picketing, boycotting, or any other over concomitants of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed

have voted by secret ballot to call a strike. Section 111.06 (2) (g) prohibits secondary boycotts as above defined, and the hindering or preventing by any means whatsoever the obtaining, use, or disposition of materials, equipment, or services, except in sympathetic strikes in support of those in similar occupations working for other employers in the same craft.[3]

Examination of the provisions of the law demonstrates that it is designed principally to hamper, impede and prevent employees from engaging in the right of self-organization, by declaring it to be an unfair labor practice to engage in those activities, without which in many cases organization cannot be effected.

The enactment of chapter 111 constitutes a deliberate attempt on the part of the Wisconsin Legislature to circumvent the holdings of this Court in the cases of **Senn v. Tile Layers' Protective Union**, 301 U. S. 468; **Lauf v. Shinners**, 303 U. S. 323, and **New Negro Alliance v. Sanitary Grocery Company, Inc.**, 303 U. S. 552. The enactment of this law also represents the effort on the part of the Wisconsin Legislature to adopt the thoroughly discredited doctrine of the case of **Bedford Cut Stone Company v. Journeymen Stone Cutters' Association**, 274 U. S. 37, as well as that of the case of **Duplex Company v. Deering**, 254 U. S. 443. The vicious doctrine of both of those cases

[3] Sections 111.06 (2) (a) and 111.06 (2) (g) read as follows:

"(2) It shall be an unfair labor practice for an employee individually or in concert with others:

"(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

"(g) To engage in a secondary boycott; or to hinder or prevent, by threats, intimidation, force, coercion or sabotage, the obtaining, use of disposition of materials, equipment or services, or to combine or conspire to hinder or prevent, by any means whatsoever, the obtaining, use or disposition of materials, equipment or services, provided, however, that nothing herein shall prevent sympathetic strikes in support of those in similar occupations working for other employers in the same craft."

was recently put to rest by the decisions of this Court in the cases of **United States v. Hutcheson**, 61 Sup. Ct. 463, and **Apex Hosiery Company v. Leader**, 310 U. S. 468.

While the Wisconsin act, therefore, is presumably an "employment peace act," it could be better defined as an an "employee slavery act," since, while paying lip service to the right to organize and bargain collectively, the act really embodies within it complete prohibitions upon the right of individuals, either singly or in concert, to exercise the rights assured to them by the Fourteenth Amendment to the Constitution of the United States, to the end that there may be no liberty of organization nor right to strike effectively.

The so-called "Wisconsin Employment Peace Act" repudiates and perverts the basic principles of the National Labor Relations Act and the 1937 Wisconsin Labor Relations Act patterned after it. While the foundation upon which the National Labor Relations Act rests is equalization of bargaining power of employers and employees, the Wisconsin Act destroys this principle of equalization and reinvests in employers powers far in excess of those possessed of employers before the passage of any labor relations act in this country, and prohibits by unconstitutional methods those activities which may bring the economic strength of the worker on a more nearly equal level with the economic strength of the employer.

The entire scheme of chapter 111 must be taken into consideration to understand what the State of Wisconsin, through its Legislature and administrative body and through its courts, have sought to impose upon the workers of this state—an involuntary servitude, and a prohibition of rights secured by the Fourteenth Amendment to the Constitution of the United States.

II.

SECTION 111.06 (2) (e), WISCONSIN STATUTES 1939, IS UNCONSTITUTIONAL AND VOID AND OF NO EFFECT WHATSOEVER BECAUSE IT CONTRAVENES THE GUARANTIES OF FREE SPEECH AND EQUAL PROTECTION OF THE LAWS AFFORDED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The first question presented for consideration is whether section 111.06 (2) (e), prohibiting peaceful picketing in connection with a strike, where such strike was not authorized by a majority of employees in a particular unit, contravenes the Fourteenth Amendment.

That the constitutionality of section 111.06 (2) (e) is involved in this case is conclusively indicated by the following facts:

1. The State Labor Relations Board predicated its order prohibiting all picketing and boycotting specifically and solely on the fact that petitioners had not complied with section 111.06 (2) (e) in securing the majority strike vote called for therein. See its Conclusions of Law 2 and 3 (R. 259-260) and its Memorandum Decision (R. 267).[4] The element of violence was not relied upon by such Board to support its order. Certain named individuals were found to have committed unfair labor practices by virtue of the misdemeanors committed by them (R. 260); but the only

[4] Conclusions of law 2 and 3 made by the Board are as follows:

2. That the respondent unions are guilty of unfair labor practices by co-operating and engaging in promoting and inducing picketing and boycotting, all being overt concomitants of a strike, without first obtaining the approval of the majority of the employes of the Plankinton House Company by a secret ballot.

3. That all of the former employes of the Plankinton House Company who went out on strike and who remained out on strike, have been parties to an unfair labor practice by co-operating and engaging in a strike without first obtaining the approval of a majority of such employes.

unfair labor practice found to have been engaged in by the respondent unions, petitioners herein, was the failure to secure the majority vote. **The State Labor Board did not find that any of the disorders were authorized or ratified by the union, nor could it so find on the basis of the uncontroverted record.**

2. The decision of the Circuit Court of Milwaukee County, sustaining the order in its entirety, was again based upon the failure of petitioners to comply with section 111.06 (2) (e), and that Court upheld section 111.06 (2) (e) as a valid exercise of the state police power. Here again the element of violence was not relied upon to sustain the order. See Circuit Court decision (R. 12).

3. Most important is the fact that the principal opinion of the Supreme Court of Wisconsin deals at length with the validity of section 111.06 (2) (e), and that opinion specifically affirms the validity of that section as a proper exercise of the police power. (See discussion of opinion at pages 56-78 of this brief.) This opinion has never been withdrawn.

The issue of the constitutionality of section 111.06 (2) (e) was necessarily passed upon by the Wisconsin Supreme Court. It was on that section of the statute that the order against the unions was predicated. But for that section the restraint against all picketing and all boycotting, finally upheld by the Supreme Court, would never have been issued in the first place. Any attempt by the Supreme Court in its supplementary opinion after motion for rehearing to circumvent its previous decision upholding the constitutionality of section 111.06 (2) (e) without withdrawing the same, must be considered as "so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent review of the decision on the Federal question." See **Leathe v. Thomas**, 207 U. S. 93, 99; **Ohio State Bank v. Bryan**, 282 U. S. 765, 774; **Johnson v. Risk**, 137 U. S. 300, 307.

In the present case no question exists as to the legality of the purposes of the strike or the justification for the picketing. We have merely this simple and ordinary factual situation:

A group of unions have a contract with an employer. Upon the expiration of the contract year the unions seek improved terms. The unions strike, and commence picketing and boycotting in support of such strike. The picketing and boycotting are enjoined under the provisions of Chapter 111, Wisconsin Statutes 1939, because such unions have failed to obtain a vote of the employees in which a majority of such employees authorize the strike, as required by section 111.06 (2) (e).

The simple issue is: Does Chapter 111, Wisconsin Statutes 1939, and particularly section 111.06 (2) (e) thereof, deprive the unions and their members of freedom of speech? And, further, does section 111.06 (2) (e) deprive minority groups of the equal protection of the laws? The further issue raised by the memorandum opinion of the Wisconsin Court is, if the plain terms of the statute are to be disregarded and the statute is not to be tested on its face, does the record sustain the issuance of the complete and comprehensive injunction against all picketing and boycotting under any purported application of the **Meadowmoor** case?

A. Section 111.06 (2) (e) Unlawfully Deprives Petitioners of the Right to Freedom of Speech Guaranteed by the Fourteenth Amendment to the Constitution of the United States

If the right peacefully to picket and boycott to inform the public of the facts of a labor dispute, and to marshal public opinion on the part of the work, is, as many times determined by this Honorable Court, a concomitant of the right of free speech, surely this constitutional right is not

one the exercise of which can be made dependent upon the wishes of a majority in a particular bargaining unit. Surely, it cannot be said that such a clear danger of substantive evils arises in cases of minority strikes or minority picketing or minority boycott as to justify an exercise of the state's police power in this respect (**American Federation of Labor v. Swing**, 85 L. Ed. [Adv. Op.] 513).

1. **"Picketing, boycotting or any other overt concomitant of a strike" when peacefully carried on are synonymous with "free speech," which is included within the terms of the Fourteenth Amendment to the Constitution of the United States.**

The decisions of this Court in the cases of **Thornhill v. Alabama**, 310 U. S. 88, and **Carlson v. California**, 310 U. S. 106, as well as its most recent pronouncements in the cases of **Milk Wagon Drivers Union et al. v. Meadowmoor Dairies, Inc.**, 85 L. Ed. (Adv. Op.) 497, and **American Federation of Labor v. Swing**, supra, have identified picketing and boycotting as the "working man's means of communication," and as synonymous with the term "free speech," which is within the protection of the Fourteenth Amendment to the Constitution of the United States from abridgement by the states.

In the **Thornhill** case this Court very significantly stated:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."

In the **Carlson** case this Court stated:

> "For the reasons set forth in our opinion in Thornhill v. Alabama, supra, publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or banner, must now be regarded as within that liberty of communication which is secured to every person by the

Fourteenth Amendment against abridgment by the State."

American Federation of Labor v. Swing, 85 L. Ed. (Adv. Op.) 513;
Senn v. Tile Layers' Protective Union, 301 U. S. 468;
C. I. O. v. Hague, 307 U. S. 197;
Schneider v. State, 308 U. S. 147;
Lovell v. Griffin, 303 U. S. 444.

2. **Section 111.06 (2) (e) is to be tested on its face.**

It was held in the case of **Thornhill v. Alabama**, supra, that statutes, the validity of which is challenged as depriving persons of rights secured by the Fourteenth Amendment to the Constitution of the United States, must be tested on their face. The Court pointed out that

> "proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. * * * It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. * * * **Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.** * * *" (Emphasis ours.)

Yet in the instant case the Supreme Court of the State of Wisconsin did not test Section 111.06 (2) (e) on its face, nor did it test the order entered thereon on its face, but wrote a tortured opinion seeking to justify the distinctions between majority and minority action on the basis of claimed distinctions between what was prohibition in the Alabama statute (**Thornhill** case) and what was only claimed regulation under the Wisconsin statute.

The Wisconsin Supreme Court stated in its opinion, with reference to the **Thornhill** case:

> "As construed by the state court it (The Alabama statute) prohibited the publishing of the facts of a labor dispute either by printed sign, by pamphlet, by word of mouth or otherwise. The Peace Act deals with concerted action in carrying on an unauthorized strike by the usual overt acts concomitant of a strike" (Supp. R. 55).

The Court also sought to justify its refusal to follow the **Thornhill** case by stating that Section 111.06 (2) (c) does not invade the right of freedom of speech because "the right of the **individual** to freedom of speech is by the terms of the act left unimpaired. It is the right to **concert of action** that is regulated." (Emphasis ours.) (Supp. R. 64.)

The Wisconsin Court further stated that Section 111.06 (2) (c) does not forbid picketing, but rather "attempts to regulate it and to provide under what conditions and circumstances picketing may be carried on by striking employees" (Supp. R. 55).

(Extended discussion of these holdings will be found in this brief at pages 56-78.)

It is apparent from the few excerpts above quoted that the Court did not seek to test this statute on its face at all, but sought to distinguish it from the statute before this Court in the **Thornhill** case by drawing superficial and insubstantial distinctions.

The emphasized portion of the quotation from the **Thornhill** case, supra, is particularly pertinent in the instant case in view of the undue emphasis placed by the Wisconsin Court in its opinion on the motion for rehearing on isolated acts of mild disorder which the record disclosed. The Court ignored completely the fact that the

Wisconsin Employment Relations Board did not base its order on those few isolated acts. And although the Wisconsin Supreme Court in its opinion states specifically that it was concerned only with Section 111.06 (2) (e) of the Wisconsin Statutes, it, nevertheless, did not test such statute on its face, but apparently sought to ground its opinion on other provisions of the law such as Section 111.06 (2) (f) which makes it an unfair labor practice to engage in threats, intimidation, force, or coercion. Yet Section 111.06 (2) (f) was not in the case, did not afford the basis for the order of the Board, and the Wisconsin Supreme Court expressly stated that it was Section 111.06 (2) (e) with which it was concerned and no other section.

3. Section 111.06 (2) (e) is not valid as a proper exercise of the police power of the state.

Deprivation of the liberty of discussion in labor disputes can be permitted only when such deprivation is necessary to prevent a clear and present danger of the destruction of life and property or the invasion of the right of privacy. Freedom of speech can be abridged only when clearly necessary for the protection of some real and apparent danger to public safety, health or morals. As stated by this Court in the **Thornhill** case, supra:

> "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. * * * But no clear and present danger of destruction of life or property or invasion of the right of privacy or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter."

Indeed, as stated by Justice Reed in his dissent in **Milk**

Wagon Drivers' Union v. Meadowmoor Dairies, Inc., supra:

> "This nation relies upon public discussion as one of the indispensable means to attain correct solutions of problems of social welfare. Curtailment of free speech limits this open discussion. Our whole history teaches that adjustment of social relations through reason is possible while free speech is maintained. **This Court has the solemn duty of determining when acts of legislation or decrees of courts infringe that right guaranteed to all citizens. Free speech may be absolutely prohibited only under the most pressing national emergencies. Those emergencies must be the kind that justify the suspension of the writ of habeas corpus or the suppression of the right of trial by Jury.**" (Emphasis ours.)

Clearly, no inherent danger to public property, health, safety or morals is present when peaceful picketing is carried on by a minority of employees rather than by a majority. No reason appears, nor has been offered, why peaceful picketing by minority groups is any more inherently dangerous to the public safety than peaceful picketing carried on by majority groups. The only possible reason which could be asserted in support of section 111.06 (2) (e) as a proper exercise of the police power is that picketing by minority rather than majority groups must necessarily and in all instances result in danger to public health, safety or morals. Such a contention has not been made and would, of course, be preposterous.

4. The right to disseminate information not limited to employer-employee relationship.

The right of labor to disseminate information concerning controversies with employers is not limited to certain types of controversies as, for example, those specifically

and directly involving only "wages, hours or working conditions," nor is it limited to controversies where immediate employees of the employer affected are disputing, or to where a particular class of employees are involved.

This question was definitely laid to rest by the decision of this Court in the case of **American Federation of Labor v. Swing**, supra. In that case an injunction of an Illinois court, restraining picketing and boycotting because there was no direct dispute between the working employees and their employer, was held to be an unconstitutional restraint of the right of free speech. This Court stated:

> "**The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute whether those limits be defined by statute or by the judicial organ of the state.** A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. American Foundries v. Tri-City Council, 257 U. S. 184, 209. The right of free communication cannot, therefore, be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. **Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case.** 'Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' Senn v. Tile Layers' Union, 301 U. S. 468, 478." (Emphasis ours.)

Under this decision the state cannot make the right to picket dependent upon whether or not majority or minority groups of employees have approved in a secret written ballot.

The state cannot make the right to picket, whether by legislative fiat, by action of administrative boards, or by the judicial arm of the state, dependent upon the granting of a **license** to a minority by a majority of the employees of the particular employer involved.

The constitutional right of Wisconsin workmen to **peacefully** disseminate information concerning an employer's labor practices by any of the methods falling within the "vague contours of the term 'picket' " (**Thornhill** case) cannot be abridged by the state merely because the exercise of such right had not been previously licensed by a majority in a secret ballot vote of the employees of the particular employer involved.

The attempt under the present legislation to limit the area of economic conflict, or to limit the class of persons who may lawfully engage in economic conflict for the betterment of their conditions, would operate to prohibit efforts of labor to improve its condition in many situations where it has heretofore found picketing and boycotting and other attempts to gain public support through publicizing the facts of a labor dispute not only helpful but vitally necessary. Thus, in the initial stage of organization labor often finds picketing necessary either to perfect organization, or finds it necessary to achieve recognition, or to combat abuses or acts of discrimination by the employer. Abuses and discrimination are of much more frequent occurrence at the early stages of organization. If labor is obliged to wait until an entire plant or a majority of an entire plant is organized before it can strike and picket, it will be unable to strike and picket or boycott, for the purpose not only of improving wages and hours

and other working conditions, or of perfecting organization, or of securing recognition, but even of protecting itself against discharges or other unfair practices by the employer.

It is entirely possible, and it has sometimes happened, that labor organizations representing a majority of employees have entered into collective bargaining agreements, which, in the opinion of individuals or minority groups, have been improvident, unwise or highly discriminatory as to these individuals or minority groups. It would be an impossibility for such minority group to persuade a majority to join with it in a strike and to engage in all the normal and natural concomitants of a strike. These minority groups, therefore, find themselves in a position wherein their right to exercise the rights of freedom of speech, press and peaceable assemblage guaranteed by the Constitution are frustrated and thwarted by the desires of a majority of employees. This again brings us back to the anomaly of that type of legislation which recognizes the exercise of a constitutional right when approved of by a majority of individuals of a particular class, but denies the exercise of these same rights to a minority group in the same class. As to the other groups and classes outside of the particular classification (that is, outside of the labor classification) there are, of course, no restrictions as to the exercise of these constitutional rights, whether by majorities or minorities. Such legislation cannot in any conceivable way be squared with the provisions of the Fourteenth Amendment to the Constitution of the United States or the decisions of this Court.

B. Section 111.06 (2) (e) of the Wisconsin Statutes and the Order Based Thereon Deny to These Petitioners the Equal Protection of the Laws, Since the Statute Does Not Embody Reasonable Classification.

Under section 111.06 (2) (e) a minority group or a majority group, not having previously balloted, when engaging in conduct therein referred to, is subject to be summoned before the Wisconsin Employment Relations Board to make answer there to the employer complaining about such conduct, whereas a majority group, having previously voted in a secret ballot in favor of a strike, engaging in the same conduct, is not so subject to the operation of the law.

A most obvious defect in such classification is indefiniteness as to numbers. A minority group may be one employee in the case of a small establishment of three employees, or may consist of four or five thousand employees, as in the case of large industrial units. Likewise, a majority group might be as little as two and as many as eleven or twelve thousand.

We are unable to find any reason in such classification. It is not a classification based upon environment, circumstances, nature of occupation, type of business, public interest involved, public health involved, public morals or safety; it has no relationship to the location of the plant or establishment, whether in an industrial or residential section, whether in a heavy traffic area or light traffic area, whether in an adequately policed area or not. It sets no definite arithmetical standard other than majority or minority. It says in one case two may do certain acts and in another case five thousand may not. It provides that in the same plant of 10,000 employees, with the same controversy over the same matters, five thousand and one may do an act, but four thousand nine hundred ninety-nine may not.

The question before discussed again presents itself—what is there inherent in the mere taking of a vote, or the failure to take a vote or the acquiescence by a majority to strike, which in the one instance presupposes that the picketing will not present a clear and present danger to the lives and property of citizens, and which, in the other instances, assumes that such clear and present danger will arise in every case of peaceful picketing?

It is clear that the Wisconsin Legislature has recognized that there is no inherent danger to the public in picketing carried on by a majority after an affirmative strike vote. The Wisconsin Supreme Court has not pointed out, nor has opposing counsel attempted to point out, any inherent difference between picketing carried on by a majority and picketing carried on by a minority who have failed to obtain a majority strike vote. Obviously, there is no such inherent difference which would permit the Legislature to presume that in one case danger to the public would never result, and in the other case such danger **would always and in every instance result.**

The Supreme Court of Oregon in **American Federation of Labor v. Bain,** 106 Pac. (2d) 544, was confronted with a statute passed by referendum vote of the people of Oregon, which likewise attempted to confine the right to picket to situations where a majority in an appropriate unit had voted to strike. The Supreme Court of Oregon found that such an attempted classification was unreasonable, had no proper relation to the purpose of the legislation, and denied to the minority group the equal protection of the laws. That Court stated in this respect as follows:

> "The law's implied recognition of the right of the majority to picket when engaged in a controversy with their employer relating to wages, hours or working conditions, is also a recognition that picketing,

peacefully conducted in those circumstances; does not give rise to 'the clear danger of substantive evils,' which alone may justify abridgment of the right. On what theory, then, can the abridgment of the right of the minority be supported? There is not inherently a difference in picketing, either with respect to the manner in which it is carried on, or the consequences to those who may be affected by it, based on the number of employees who may be disputing with their employer. On the contrary, whether engaged in on behalf of a few or many, picketing may be peaceful or otherwise for a lawful or unlawful purpose, by a single individual or en masse, and fraught with either negligible or serious consequences to the employer and the public. See **People v. Gidaly**, 35 Cal. App. (2d) 758, 93 P. (2d) 660. Besides the invalid classification which the Court found in the cited case in a similar law, the fundamental defect of the statute, in the light of the Supreme Court's decisions is, that it is not aimed at specific evils which the state without doubt has power to correct; but the prohibition, to the extent that it applies, is as broad as that condemned in the Thornhill and Carlson cases, and like the enactments there considered, 'sweeps within the ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press.'

"The fundamental constitutional right which the Supreme Court sustained in the cited cases was declared to be secured to 'every person.' We see no escape from the conclusion that the denial of such a right to the members of a minority is no less an unconstitutional abridgment of the right simply because it is saved to the majority."

This case was cited to the Wisconsin Supreme Court but not followed by it.

In the instant case it is interesting to note the Wisconsin court's remarks with respect to the argument that majority rule is a fundamental tenet of our constitutional system.

The argument is made that section 111.06 (2) (e) is merely an application of the majority rule, which is an essential part of our democracy. Attention is called to the majority rule provisions of the various labor relations acts and to the majority rule provision with respect to elections. However, this argument overlooks the very obvious fact that in those cases where the majority have made their selection the minority is, nevertheless, free to continue to exercise their constitutional rights without restraint. The Republican party today is still free to criticize all of the policies and practices of the majority-elected Democratic President. Those who did not vote for our President, while bound by the results of the election, are, nevertheless, free to express their opinions concerning his conduct of our Government's affairs and so express themselves in the hope that they may establish a majority in the next election to defeat him.

The bulwark of our democratic form of government lies in **the constitutional guaranties that any person, regardless of whether such person is a member of a majority group or not, is entitled to the free expression of his own opinions and is liable only for the abuse thereof.**

It has been stated by a prominent clergyman in criticism of attempted application of the majority rule in so far as **human rights** are concerned that this results in the substitution of arithmetic for principles principles of morality. The proof of this statement can be found in the tragic history of Europe in recent years where we find minority religious, political, and economic groups mercilessly punished and deprived of all human rights. Legislation of the type herein challenged is, in our opinion, an opening wedge to similar exploitation of minority groups in this country and is equally reprehensible.

CONCLUSIONS ON CONSTITUTIONALITY OF THE STATUTE.

Under the decisions of this Court there can be no possible justification for any statute or order under which the exercise of those rights assured by the Fourteenth Amendment to the Constitution of the United States can be made to depend upon arithmetical standard. Minority groups under our form of government have an equal right with majority groups to exercise those rights which are protected by the Fourteenth Amendment to the Constitution of the United States, and to be free from restraint by action of any arm of the state which abridges their privileges or immunities, deprives them of life, liberty, or property without due process of law, or denies to them the equal protection of the laws.

III.

THE DECISION OF THIS COURT IN THE CASE OF MILK WAGON DRIVERS OF CHICAGO V. MEADOWMOOR DAIRIES, INC., SUPRA, IS NOT APPLICABLE.

A. The Basis for the Board Order as Demonstrated by Board Decision, Circuit Court Decision and First Supreme Court Decision, Was Failure to Obtain Majority Vote and Not Violence.

The original decision of the Wisconsin Supreme Court in this case was very clearly and definitely based upon the holding that distinguishing between what a majority may do in furtherance of an authorized strike and what a minority may do in furtherance of an unauthorized strike constituted a valid exercise of the police power of the State of Wisconsin, and operated as a regulation of the right of free speech rather than a prohibition thereof.

In our opinion the Wisconsin Supreme Court on the mo-

tion for rehearing sought to place the decision upon a non-federal ground entirely, and to assert that the decision was based upon the isolated acts of mild disorder which occurred during the early days of the strike.

There is absolutely no place in the findings of the Board or in the order of the Board, nor in its memorandum decision, any holding, indication, implication, or inference of any kind whatsoever that the Board found that the activities of the union were "set in a background of violence," or that "it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful" (**Milk Wagon Drivers etc. v. Meadowmoor Dairies, Inc.**, supra).

As a matter of fact, the memorandum decision accompanying the order of the Board clearly points out that the order prohibiting picketing and boycotting is based upon the fact that

> "Before going on strike, no vote by secret ballot authorizing the strike, was taken among the employees of the hotel. This, under Chapter 111 of the Wisconsin Statutes, is clearly an unfair labor practice, and all of the employees taking part in such strike are necessarily parties to such unfair labor practice. * * * To many this result may seem to be harsh penalty, **but it is a result that flows naturally from this law, and is something which this Board as an administrative Board has nothing to do with.**" (Emphasis ours.) (R. 851, 852.)

The decision of the Board in no way characterizes the union campaign as being one so marked by violence that peaceful picketing is impossible under the circumstances. Reference to the order of the Board indicates that the findings of fact with reference to the disorders are made only to sustain the conclusion of law that the persons

named have committed unfair labor practices. **This conclusion of law** (R. 260) **does not refer to or involve the union, nor are the activities of the individually named persons attributed to the union.**

The Board specifically found in conclusions of law Nos. 2 and 3 (R. 259) that the respondent unions and their members were guilty of unfair labor practices **only by virtue of the employees having gone out on strike without first obtaining the approval of the majority by secret ballot and by co-operating in strike activities without such approval.** [See footnote (4) at p. 23 of this brief.]

The Board ordered these petitioners to cease and desist from intimidation, force, or coercion. This, however, was not tantamount to a finding of the Board that the peaceful activities engaged in by these organizations and their members are coercive, intimidating and injurious, and must, therefore, be prohibited in their entirety. **That this is not so was recognized by the Circuit Court in its grant of a qualified stay of judgment, permitting peaceful picketing activities during certain hours of the day** (R. 52-57).

Certainly if the original order were based upon a finding that the isolated acts of claimed violence engaged in were so enmeshed with the peaceful activities that it would be imminently dangerous to permit continued peaceful activities there can be no possible justification for the Court permitting such peaceful activities pending the final determination of the Wisconsin Supreme Court. The Court cannot blow hot and cold at the same time. It cannot say on the one hand that there can be no such thing as peaceful picketing in view of the circumstances, and on the other hand, however, permit peaceful picketing.

A careful examination of the findings of fact, conclusions of law, order, and memorandum (R. 846-854) fail to disclose any finding by the Board, express or implied,

that the union had ratified or authorized the conduct of such employees, or that the unions by virtue of any such authorization or ratification have committed an unfair labor practice which results in denying to them the right to peacefully picket.

Certainly, it must be apparent that the few isolated acts of disorder were not relied upon by the Board to justify the order prohibiting all picketing and all boycotting. As a matter of fact, a part of the order of the Board relates to unlawful acts and provides as follows:

> "1. Immediately cease and desist from:
>
> * * * * * * * *
>
> (b) Attempting to hinder or prevent by threats, intimidation, force, or coercion of any kind, the pursuit of lawful work by employees of the Plankinton House Company."

Therefore, it is obvious that the order prohibiting picketing and boycotting in no way and no sense was based upon any finding by the Board that conduct engaged in by some of the pickets was of such nature that all picketing and boycotting could be restrained under the decision of this Court in the **Meadowmoor** case.

The fact is that the order entered by the Board is not based in any way upon a finding or claim that the few isolated acts of mild disorder which took place the first few days of the strike so characterized the activities of the unions that the Board, in the exercise of its judgment, determined to prohibit all activities, nor could it so determine on the facts of this case. It is further apparent that the Board made no finding that these few isolated acts of disorder were such that it "could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful." (**Milk Wagon Drivers' Union of Chicago, Etc., v. Meadowmoor Dairies, Inc.**, supra).

While it is true that both the Circuit Court and the Supreme Court of the State of Wisconsin made reference in their decisions to these misdemeanors, the fact remains that neither the Circuit Court nor the Wisconsin Supreme Court had any jurisdiction other than to enforce the order of the Board. The determination of whether or not an order should be entered and the reasons for entering such order rested with the Board in the first instance.

In this connection, it is interesting to note that the Wisconsin Supreme Court in the case of **Allen Bradley Local 1111, Etc., v. Wisconsin Employment Relations Board**, 237 Wis. 164, 295 N. W. 691, in dealing with the powers and authority of the Board, pointed out:

> "As already stated, the manner and extent to which the act shall apply in a particular case pending before it is committed to the discretion of the board."

In the instant case the Board did **not** exercise its discretion to issue a restraining order on the basis of the principles enunciated in the **Meadowmoor** case.

As we understand the decision of this Court in the Meadowmoore case the only justification for the entry of an order prohibiting all picketing (the order in the instant case prohibits boycotting also) must lie in the express finding of acts of extreme violence, which are so enmeshed with and indistinguishable from the peaceful, legitimate activities that the trier of fact can come to the reasonable conclusion, supported by facts, that such complete ban is necessary to prevent similar acts of violence in the future and until the time that the momentum of fear generated by such extreme violence has appreciably declined or disappeared.

In the instant case the Wisconsin Employment Relations Board could not and did not come to such conclusion, nor did it in any way seek to justify its conclusion on that

basis. Any attempt, therefore, on the part of the Supreme Court of the State of Wisconsin to subsequently justify such order by substituting its own findings of fact or by misinterpreting and rewriting the order to conform to the **Meadowmoor case** (which decision was rendered after the decision on the motion for rehearing) must be rejected as an effort to accomplish a result which cannot be otherwise justified.

As we have pointed out in our original brief, in support of the petition for writ of certiorari, this Court does have jurisdiction to issue a writ of certiorari to a state court where any device used to support the decisions is "so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent review of the decision on the federal question" (**Leathe v. Thomas**, 207 U. S. 92, 99; **Ohio State Bank v. Bryan**, 282 U. S. 765, 774; **Johnson v. Risk**, 137 U. S. 300, 307).

B. Assuming That Violence Was the Basis for the Order Prohibiting All Picketing and Boycotting, Such Order Cannot Be Supported by the Facts.

In the **Meadowmoor** case it was clear that the injunction of the court below was prompted by a situation of **unusual** and **extraordinary** violence from which it "could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful," and which acts of violence were "neither esoteric nor isolated."

This Court also made it abundantly clear, however, that constitutional freedom was not to "be defeated by insubstantial findings of fact screening reality," and that, therefore, "this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made." This Court pointed out that

"the right of free speech cannot be denied by drawing from a trivial, rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force."

Accepting the findings of fact by the State Board as a verity in the instant case we find that the strike occurred on November 2, 1939, and that hearing was had before the Wisconsin Employment Relations Board beginning with the 1st day of December, 1939. From November 4 through November 17, 1939, six pickets were arrested and fined in police court on charges of assault and battery, and on two occasions deliveries to the Plankinton Hotel were prevented by pickets by means of force (R. 257-259). The entire findings of the State Board in respect to violence appear on pages 257 to 259 of the record, as set forth in footnote[3] below. **In all there were seven incidents on four days.**

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3. 19. On November 4, 1939, union pickets, by means of force, prevented delivery to the Plankinton House of floral decorations by one Joseph Mueller, an employe of August F. Kellner Company. That as a result of the altercation at said time Jack Heisdorf, vice-president of Local No. 122, Hotel and Restaurant Employees International Alliance, and Charles McLaughlin, assistant to the secretary of Local No. 122, were arrested and on November 17, 1939, convicted of assault and battery, McLaughlin being fined $10.00 and costs and Heisdorf being fined $5.00 and costs, the sentence against Heisdorf being suspended and he was placed on probation for thirty days. That Local No. 122 provided counsel and bail for both Heisdorf and McLaughlin and paid McLaughlin's fine.

20. Charles McLaughlin returned to the picket line immediately after his arrest, and on November 17, 1939, assaulted one Lester Raasch, an employe of the Plankinton House, was again arrested, convicted and fined $25.00 and costs and the union again provided him with counsel and paid such fine.

21. On November 4, 1939, two salesmen representing the Automotive Electrical Association, who were attempting to deliver displays and samples to the Plankinton House, were, by means of force, prohibited from making the delivery by Phil L. Valley and a number of pickets.

22. On November 10, 1939, Jack Heisdorf, Charles Alden, striking employe of the Plankinton House, and other pickets, by the use of force prevented delivery of ice cubes to the Plankinton House, and in the course of the attempted delivery Charles Alden assaulted Robert Jeske, then an employe of the Plankinton House.

23. On November 17, 1939, Paul Ziebell, an employe of the Plankinton House, was assaulted by James O'Brien, a picket employed by the union and stationed on the picket line at the Plankinton House. O'Brien was arrested, convicted and fined five dollars and costs.

24. On November 14, 1939, Edward Knopf, an employe of the Plankin-

Examination of the record upon which these findings are based discloses the following:

Finding 19 is predicated upon testimony that the delivery man had some bittersweet knocked from his hand, but that no personal violence of any kind was inflicted upon any person (R. 102, 103).

With respect to finding 20, the record discloses that the assault on the employee was occasioned by the assertion of the pickets that the employee used physical violence on two girls in the picket line (R. 138). In this connection it is also pertinent to note that the union member involved in the assault mentioned in finding 20 was reprimanded by the executive board of the Hotel and Restaurant Workers' Union (R. 92), and was forbidden from again appearing on the picket line (R. 97-99).

With respect to finding 21, the only testimony to support such finding is that the officer of the union pushed the hand of one of the delivery men (R. 140).

With respect to finding 22, it is pertinent to note that there was a general altercation, provoked by the action of ten nonstriking employees, who knocked down two pickets (R. 93, 94).

The picket referred to in finding 23 was not a member of the union, was not authorized to appear on the picket line, and was forbidden to again appear on the picket line after the offense was called to the attention of the union (R. 97, 98).

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ton House, was assaulted by John Thomas O'Maher, a picket stationed by the union at the Plankinton House, and a striking employe of the Plankinton House.

25. On November 17, 1939, Rudolph Stano, an employe of the Plankinton House, was assaulted by Joseph Hofich, a picket stationed at the Plankinton House by the union, and Hofich was arrested, convicted, and fined five dollars and costs.

26. On November 17, 1939, Thomas James, an employe of the Plankinton House, was assaulted by Larry McAllen, a picket stationed at the hotel by the union, and fined five dollars and costs.

The altercation referred to in finding 24 apparently was the result of a personal controversy between two employees which antedated the strike (R. 145).

The incident referred to in finding 25, according to the claim of the picket, was provoked by the assaulted non-striking employee (R. 144).

It is further pertinent to note that those members who got into difficulties when on the picket line were reprimanded by the union, and were warned against repetition at the risk of loss of membership (R. 94-99, 217-222).

In the brief in opposition to the petition for certiorari the Attorney-General enumerated instances of violence, a number of which do not appear in the findings of fact made by the Board. Examination of the record discloses that such testimony was permitted by the Board over the objections of the union, but **subject to proof being later adduced connecting such events to the union** (R. 146-147, 156, 157). **No such proof was subsequently adduced**, and consequently the Board made no findings with respect to those instances. Counsel for the Wisconsin Employment Relations Board, therefore, goes outside of the findings of fact made by the Board in an effort to bolster the contention that the facts in this case bring the case within the rule announced in the Meadowmoor case.

These events, however, were not in any way or manner attributable to the union, and it is manifestly unfair for the Attorney-General of the State of Wisconsin to comb the record for the purpose of finding whatever remote unsupported fact he can for the purpose of discrediting the union, and in an effort to bring the instant case within the decision of this Court in the **Meadowmoor** case.

Similarly, the Attorney-General emphasized at page 18 of his brief in opposition to the petition for writ of certiorari that a police captain testified to the number of

arrests and convictions; but does not inform this Court that this testimony merely summarized the findings which were set forth in detail on pages 15 to 17 of the brief.

Also, the activities of the union are referred to as constituting violence, crimes and misdemeanors, when, in fact, the proceedings which resulted in fines were civil proceedings for the purpose of collecting a penalty for violation of city ordinances (**Milwaukee v. Johnson,** 192 Wis. 585, 213 N. W. 335).

The fact remains that there were exactly seven incidents which even remotely resembled disorders in a strike involving over 188 employees, with picketing conducted twenty-four hours a day at two hotels having five entrances and located in downtown Milwaukee, three of which incidents occurred on November 4, 1939, two days after the commencement of the strike, and the remainder of which occurred between November 5, 1939, and November 17, 1939 (R. 257-259). The hearing before the Wisconsin Employment Relations Board was held on December 10, 11, 12, 13 and 14, 1939 (R. 9). The State Board did not and could not find any unlawful acts having occurred between November 17th and December 14th. **Note particularly the testimony of the police captain that the police department "has been able to maintain order very, very adequately"; that it had "the situation very well in hand," and that the pickets conducted themselves "very orderly"** (R. 197-198).

It is on the basis of this showing that it is now claimed, although not found by the trier of fact, that the injunction can be supported under the doctrine enunciated by this Court in the **Meadowmoor** case, which involved

> "more than fifty instances of window-smashing; explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy using the vendor system and to five stores; stench bombs were dropped

in five stores; three trucks of vendors were wrecked, seriously injuring one driver, and another was driven into the river; a store was set on fire and in a large measure ruined; two trucks of vendors were burned; a storekeeper and a truck driver were severely beaten; workers at a dairy which, like Meadowmoor, used the vendor system, were held with guns and severely beaten about the head while being told 'to join the union'; carloads of men followed vendors' trucks, threatened the drivers, and in one instance shot at the truck and the driver. In more than a dozen of these occurrences, involving window-smashing, bombings, burnings, the wrecking of trucks, shootings, and beatings, there was testimony to identify the wrongdoers as union men."

Those are the facts which this Court held supported the injunction in the **Meadowmoor** case. Contrast those facts with the record in the instant case, and it becomes readily apparent that there is no basis whatsoever for any argument that the cases are parallel and call for application of the same principles. In the instant case there are six or seven simple assaults and nothing more. The entire situation was well within the control of the police authorities. Those assaults which did occur were immediately submitted to the police court for determination, and those assaults ceased approximately two weeks before the hearings commenced before the State Labor Board. They have not been repeated in the two years since.

Certainly, by no stretch of the imagination could such fugitive encounters, occurring only in the early days of the strike, when feelings usually run highest, be held to justify a complete restraint on all peaceful picketing and boycotting activities in the future. The Wisconsin Employment Relations Board did not so hold, but the Supreme Court of the State of Wisconsin, in the opinion

rendered on the motion for rehearing apparently sought to justify the prohibition on such grounds. We say "apparently" since the decision on the motion for rehearing merely further obscured an already obscure and evasive opinion.

In such case it still rests with this Court "to enforce constitutional liberties even when denied through spurious findings of fact in a State court." (**Meadowmoor** case.)

It was aptly stated in the case of **Great Northern Railway Co. v. Local Great Falls Lodge of I. A. of M.**, 283 Fed. 557:

> "These controversies (dispute between employer and employee) inevitably present provocative situations, and may involve encounters and disorders for which neither party may be solely responsible. Often trivial, they do not threaten irreparable injury and so do not warrant interposition by a court of equity, but can be adequately remedied by appeal to local authority."

See, also, **Great Northern Ry. Co. v. Brosseau**, 286 Fed. 414.

Similarly, in the case of **Republic Steel Corporation v. National Labor Relations Board**, 107 Fed. (2d) 472 (C. C. A. 3) it was stated:

> "We think it must be conceded, however, that some disorder is, unfortunately, quite usual in any extensive or long drawn-out strike. A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat to those engaged in the contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regretted, must have been in the contemplation of the Congress when

it provided in Section 13 of the Act (National Labor Relations Act, 29 U. S. Code, paras. 151 to 160) that nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike. If this were not so the rights afforded to employees by the act would be indeed illusory * * *."

Human experience aptly demonstrates that a few fugitive encounters on the picket line in the early stages of a strike can no more be controlled or prevented by responsible leaders of organized labor than can the sun be stopped in its course. The intensity of emotion, the livelihood that is at stake, the desire to protect a job for oneself and one's dependents, all inject into strikes and picketing such elements that must of necessity in some cases and in the early days of a strike, when feelings naturally run high, lead to some cases of spontaneous eruption. Surely these are not the activities that this Court meant when it referred to "the continuance and recurrence of flagrant violence." (**Meadowmoor** case.)

To penalize workingmen by depriving them of the constitutionally guaranteed right of free speech because of occasional excesses indulged in by a few workers of more volatile emotion (many of which excesses are instigated or provoked by others, as demonstrated in the reports of the Senator La Follette Investigating Committee) is indeed to exact a price all out of proportion to the value of the rights at stake.

C. The Wisconsin Employment Relations Board Did Not Find That These Acts of Violence Are Attributable to the Unions or That the Unions as Such Are Responsible Therefor.

It is particularly pertinent to note that, although the Wisconsin Employment Relations Board made specific findings of fact as to minor disorders and named the per-

sons who committed such disorders, no place in the findings of fact or in the conclusions of law does there appear any finding by the Board that such actions were authorized by these petitioning unions.

The only action which the Wisconsin Employment Relations Board deemed proper was to make a finding that the individuals named committed unfair labor practices by virtue of their own offenses. Under any view of the case, therefore, there is no possible basis to support the order prohibiting the unions and their members from engaging in peaceful activities in the future.

IV.

THE ORDER IS MORE COMPREHENSIVE THAN NECESSARY OR PROPER UNDER THE DOCTRINE OF THE MEADOWMOOR CASE.

In the **Meadowmoor** case this Court repeatedly emphasized that the injunction therein justified itself because of the **extreme case of violence** therein presented to the Court. This Court was careful to point out that an injunction which is based upon extreme and flagrant cases of violence must, nevertheless, be directed only to those activities which can reasonably be associated with violence. This Court pointed out that there was no justification in the **Meadowmoor** case to anticipate that the injunction therein sustained would be put to "abnormal uses."

This Court also stated that it was not proper in that case to

> "generalize the terms of an injunction derived from and directed toward violent conduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved."

In the instant case we do have an injunction which is a complete prohibition of all picketing and of all boycotting

which would include in its broad meaning all other means of communication wholly unrelated to the violence involved. The prohibition against "boycotting in any way the Plankinton House Company" is as all-inclusive and general an interdiction as could be imagined.

The instruments of boycott are many and varied. They may range from the picket line to the distribution of circulars; the carrying of placards throughout the streets; announcements made on the radio; the publication of "unfair lists"; the writing of letters, and oral persuasion.

Prohibiting all forms of boycotting, therefore, cannot in any way be related to any claim that violence on the picket line is such that all the other instrumentalities of boycotting are tainted thereby and are enmeshed with such violence.

We, therefore, have in the instant case an order which is not at all limited in any reasonable or proper manner. The order by its very terms prohibits every conceivable type of activity which labor organizations might engage in for legitimate purposes.

Your petitioners, in arguing before the Supreme Court of the State of Wisconsin, urged that the terms "picketing" and "boycotting" were unnecessarily vague and so comprehensive that your petitioners were not completely apprised of what conduct could and could not be engaged in, and, further, that the terms necessarily include action which fell within the protection of the constitutional guarantee of free speech. In its decision the Supreme Court answered this argument by stating:

> "While it is true that the terms 'picketing' and 'boycotting' are not terms of definite legal content, they are descriptive of a process well known to the law, and when considered in connection with the other provisions of Chapters 111 and 103, Stats. 1939, the meaning of these terms becomes reasonably certain."

Here was not an attempt to circumscribe the meanings of these terms to a limited situation relating to violence, but rather a recognition of the practically unlimited scope of such terms. For instance, section 103.53, referred to by the Court, enumerates the following activities, among others:

> "(e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace or threat thereof.
>
> • • • • • • • • •
>
> "(g) Assembling peaceably to do or to organize to do any of the acts heretofore specified or to promote lawful interests.
>
> "(h) Advising or notifying any person or persons of an intention to do any of the acts heretofore specified.
>
> • • • • • • •
>
> "(j) Advising, urging or inducing without fraud, violence, or threat thereof, others to do the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103.52; and
>
> • • • • • • • •
>
> "(l) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal."

Therefore, by the Court's own construction of the order the activities which are banned (they include all of the above) embrace almost every conceivable action which would fall within the protection of the right of free speech.

We, therefore, have in the instant case a prohibition which is as broad and as comprehensive a prohibition on the right of free speech as one might possibly conceive of. Certainly if it is the **Meadowmoor case**, which it is claimed

will support the injunction herein, the injunction is, nevertheless, much more comprehensive than the circumstances warrant. The writing of letters urging prospective customers not to patronize the hotel certainly does not bear such close and intimate relationship to the acts of violence which have previously occurred which would justify the restraint upon such exercise of the right of free speech. Yet the order does by its very terms prohibit such conduct.[6]

It is respectfully submitted that under no circumstances, for no reason, and under no theory known to law can an order as broad as the instant one be sustained.

Conclusion on Purported Applicability of Meadowmoor Case.

It is regrettable that the **Meadowmoor** decision of this Court has been utilized by justices who have refused to accept the principles pronounced in the Norris-La Guardia Act and in the **Swing** case, or who have sought to construe statutes to death for the purpose of overcoming and defeating the decisions of this Court in the **Thornhill, Carlson** and **Swing** cases.

In fact, justices with a clearer vision and more ready desire to accept the United States Supreme Court pronouncements have had occasion to direct the attention of their brethren of such aptitude to misapply the **Meadowmoor** case. Justice Lehman, Chief Justice of the New York Court of Appeals, in **Opera on Tour, Inc., v. Weber**, 34 N. E. (2d) 349 (N. Y.); Justice Farthing of the Illinois Supreme Court, in **Ellingsen v. Milk Wagon Drivers Union of Chicago, Local 753**, 35 N. E. (2d) 349 (Ill.), and

[6] The petitioning unions, their officers, members and agents were ordered not only to cease and desist from promoting or inducing picketing at or near the Plankinton House, but also from "(c) boycotting in any way the Plankinton House Company." (Emphasis ours.)

2063 Lawrence Avenue Building Corporation v. Gust Van Heck, 35 N. E. (2d) 373 (Ill.).

Unless the justices so disposed not to follow the decisions of the United States Supreme Court are curbed in their predilections, the Norris-La Guardia Act and other prototypes will suffer the same fate as did the Clayton Act. This Court only recently had occasion to make known to the courts of the States of New Jersey, Illinois and New York that they must be bound by the interpretations of the United States Constitution placed on it by the United States Supreme Court (**Miller v. Journeymen Tailors' Union**, 61 Sup. Ct. 632; **American Federation of Labor v. Swing**, 61 Sup. Ct. 568; **Wohl and Platzman v. Bakery & Pastry Drivers & Helpers' Local 802**, 85 L. Ed. [Adv. Op.] 998).

We repeat that it is regrettable that after the plain and clear decisions of this Court in the **Senn, Thornhill** and **Carlson** cases it should, nevertheless, have become necessary for the Court to reverse the New York Court of Appeals in the **Platzman** case, the New Jersey court in the **Miller** case and the Illinois court in the **Swing** case. In our opinion this demonstrates a reluctance on the part of many state courts to accept the principles enunciated by this Court when the acceptance of such principles means that their own economic predilections must give way.

We, therefore, respectfully submit that any effort to pervert the decision in the **Meadowmoor** case so as to hold it applicable to the circumstances disclosed by the record in the instant case, for the purpose of restraining the exercise of free speech, must be rejected by this Court so that the message may go out to the country that the exercise of constitutional rights in this democracy is not going to be made dependent upon either the economic predilections of the legislatures or courts of the states, but, as

Justice Black and Justice Reed point out in the **Meadowmoor** case, constitutional guaranties must remain inviolate.

V.

ANALYSIS OF DECISION OF THE WISCONSIN SUPREME COURT DISCLOSES THE COMPLETE FALLACY THEREOF.

Examination of the opinion of the Wisconsin Court demonstrates that such decision concerns itself chiefly with the attempt to distinguish the controlling opinions in the cases of **Thornhill v. Alabama**, 310 U. S. 88; **Carlson v. California**, 310 U. S. 106 (rehearing denied 60 Sup. Ct. 1072), as well as the **Bain** case in Oregon, 106 Pac. (2d) 544. In this attempt to distinguish and to justify the decision of the Court there emerge in the first part of the opinion five pairs of contrasting concepts. It was the opinion of the Wisconsin Court, apparently, that in the difference between these concepts lies the difference between section 111.06 (2) (e) and other comparable legislation which has been declared void by the Supreme Court of the United States.

As we read the decision, the Court found that section 111.06 (2) (e) differs from and must be given entirely different treatment than the legislation considered by this Court in the **Thornhill** and **Carlson** cases and by the Supreme Court of the State of Oregon in the **Bain** case, for the following reasons:

1. In those cases the legislation dealt with the action of individuals. In the instant case it deals with "collective" or "concerted" activities.

2. In those cases the Court had before it absolute prohibitions of the right of free speech. In the instant case such absolute prohibition to a minority is called regulation.

3. In those cases the exercise of rights guaranteed

by the Constitution were by legislative declaration termed "unlawful" acts, while in the instant case we are dealing with "unfair" labor practices."

4. The term "picketing," as used in the **Thornhill** case, differs in meaning and scope from that term as it is used in section 111.06 (2) (e).

5. In the instant case the Legislature has not prohibited the right to strike, but has divided strikes into authorized and unauthorized activities, permitting the exercise of constitutional rights in the one case and prohibiting it in the other.

In the Court's explanation and exposition of the above concepts, in the Court's contrasting of the differences of those concepts, and in the Court's application of those concepts to the instant case, lies the basis for the Court's decision.

We discuss those concepts seriatim:

1. Individual v. Co-Operative Action.

The Wisconsin Court sought to distinguish the statute involved in the **Thornhill** case from the statute in the instant case:

> "As construed by the state court it (the Alabama Statute) prohibited the publicising the facts of a labor dispute, either by printed sign, by pamphlet, by word of mouth, or otherwise. The Peace Act deals with concerted action in carrying on an unauthorized strike by the usual overt acts concomitant of a strike" (Supp. R. 55).

What the court did **not** point out was that the Peace Act, in dealing with this concerted action in carrying on an "unauthorized" strike, prohibits and did prohibit in the instant case the publicising of the facts of a labor dispute in a peaceful and truthful manner by printed sign, by pamphlet, by word of mouth, or by any other of the usual "overt concomitants of a strike."

That is exactly what the statute in the instant case prohibits. That is exactly what the order of the State Board prohibits, and that is exactly the conduct which the Wisconsin Supreme Court prohibited by its affirmance of the judgment of the Circuit Court, enforcing the order of the Board.

The Court seeks to justify this result by stating that the act does not apply to individuals, but to concerted action; that it is the co-operating feature of the act which becomes important (Supp. R. 56). Later in the decision the Court again states that section 111.06 (2) (e) does not invade the right of freedom of speech because "the right of the individual to freedom of speech is by the terms of the act left unimpaired. It is the right to **concert** of action that is regulated" (Supp. R. 64). (Emphasis ours.)

Conclusive on this point are the **Thornhill** and **Carlson** cases, supra, which sustained not only the right of the individual, but also the right of groups and organizations of individuals, to engage in activities protected by the Fourteenth Amendment from abridgment by the states. An examination of those decisions discloses that this Court was not dealing with individual rights solely, but was specifically and of necessity speaking of group rights as well.

In the **Thornhill** case the statute involved which was to be tested on its face was directed to "any person or **persons**"; Thornhill on the morning of his arrest was "in company with six or eight other men" "on the picket line"; almost all of 100 employees were on strike and a picket line had been maintained constantly; that fact that it was possible to infer that "petitioner was in the company of six or eight others when the conversation took place" was said by the Supreme Court to be "not material in our view of the case" (Footnote 6).

In the **Carlson** case "appellant was one of a group of 29 men engaged in picketing," many of whom, including the appellant, carried signs reading "This shop is unfair to C. I. O."

From the above facts in the **Thornhill** and **Carlson** cases it is apparent that this Court did not have before it the question of individual rights as distinct from group rights or "concerted" activities or "co-operative" activities. An examination of the decision demonstrates that it is rather the exercise of rights "co-operatively" and in "concert" which this Court emphasized.

Preliminarily it was pointed out in the **Thornhill** case that the statute made no exception as to the "number of persons engaged in the prohibited activities." The qualification "without just cause or legal excuse" was dismissed as not having "any ascertainable meaning either inherent or historical." It was pointed out that "employees or others" may be convicted of the offense and that the statutory regulation challenged in the case infringes "upon the right of employees effectively to inform the public of the facts of a labor dispute."

This Court quoted with approval and affirmed the statement in the **Senn** case that "**members of a union** might, without specific statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

It was emphasized that the activities prohibited by the statute embraced "nearly every practicable, effective means whereby **those** interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute."

In addition to the above direct references to group action, concerted and co-operative, the entire decision

breathes with the true spirit of democratic ideals—the right of individuals to band together, to co-operate one with the other, to engage in concerted activities for the attainment of their lawful objectives by lawful means. All public policy indicates that protection of workers in group action for "mutual aid and protection."

If an individual has a right to express himself in a peaceful and orderly manner, then certainly more than one individual acting in concert have a right to express themselves in a peaceful and orderly manner. Only when the numbers engaging in such activities become so great or become so disorderly that laws are violated can such right be denied to them. Section 111.06 (2) (e) obviously is not confined to that situation, and bears no relationship at all to the possibility of breaches of the peace, violations of the law, or disorders of any kind.

If the Wisconsin Court is right in upholding the Legislature in prohibiting the right of free speech on the ground that concert of action takes such conduct out of the protection of the Fourteenth Amendment, then it must also uphold the right of the Legislature to prohibit religious worship when engaged in by any particular group or sect in a common meeting-place and for common spiritual purposes.

If the Wisconsin Court is right in this case then the Legislature may say to the individual citizens, "we recognize and honor your **individual** right to religious worship, but we deny you such right if you seek to worship in **concert with others.**"

After all, isn't that what the Wisconsin Court said when it sought to distinguish section 111.06 (2) (e) on the ground that it deals with the **concerted peaceful exercise** of a constitutional right rather than with the **individual** exercise of such right?

Concerted Minority Action v. Concerted Majority Action.

There is a further fallacy in the attempt to distinguish section 111.06 (2) (e) by asserting it deals with concerted activities rather than individual activities. Upon what basis can the Legislature provide that concerted activities by a **minority** group constitute "unfair practices" and are subject to prohibition while the identical concerted activities by a **majority** are valid and free from restraint? What reasonable basis is there for this division of **peaceful concerted** activities into permissible majority action and prohibited minority action? Search as diligently as we might we cannot find any place in the decision of the Wisconsin Court any possible basis for this classification.

2. Prohibition v. Regulation.

There is contained in the **Thornhill** case the very reasonable and logical declaration that, although a state may not restrain the right of free speech, it may, nevertheless, adopt such legislation as will "preserve the peace, and protect the privacy, the lives and the property of its residents."

The Wisconsin Court, in upholding the validity of section 111.06 (2) (e), stated in its opinion that we have in the instant case the type of regulation referred to in the **Thornhill** case.

In the decision it is stated that the Peace Act does not forbid picketing, but, rather, "attempts to regulate it and to provide under what conditions and circumstances picketing may be carried on by striking employees." It is further pointed out that violation of the act is "merely" an unfair labor practice.

The Court completely overlooked in its attempt to

classify this legislation as regulatory rather than prohibitory, the fact that the statute, on its face, the order by its terms, and the decision of the Wisconsin Court result in an absolute denial to these petitioners and to their membership of the right to publicize the facts of their dispute and disagreement with the respondent hotels. There can be no equivocation about this, and there is no sense in quibbling. One cannot just say, "I am taking away from you all of your rights, but I am not prohibiting such rights. When I do so I am merely regulating them."

It was stated by this Court in the **Thornhill** case:

> "The state urges that the purpose of the challenged statute is the protection of the community from the violence and breaches of the peace, which, it asserts, are the concomitants of picketing. The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives and the property of its residents cannot be doubted. But no clear and present danger of destruction of lives and property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare **American Foundries v. Tri-City Council**, 257 U. S. 184, 205. Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern."

The foregoing quotation answers the argument that the

Peace Act differs from the Alabama Act, because the former only regulates picketing, while the latter prohibits it. Obviously, there is and can be no distinction between "regulation" which has the necessary effect of prohibition and legislation which prohibits. As stated by the Oregon Court in the **Bain** case:

> "In considering constitutional questions the courts look through forms to the substance of things. It is not important, therefore, whether we call the statute one of prohibition or regulation."

It is clear that the **Thornhill** decision is predicated on no such fine distinction between prohibitory and regulatory legislation, and that the language of this Court has reference to all legislation which has the effect of preventing or restraining "the dissemination of information concerning the facts of a labor dispute." Any impairment or diminishing of the effective exercise of this right must be struck down. As stated by this Court:

> "Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate, foundation on which to rest regulations which are aimed at or **in their operation diminish the effective exercise of rights** so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations." (Emphasis ours.)

3. **Unlawful Acts v. "Unfair Labor Practices."**

In its decision the Wisconsin Court relied on the fact that we have here involved an "unfair labor practice" rather than an unlawful act. The Court seems to think that because in the **Thornhill**, **Carlson** and **Bain** cases certain acts were called misdemeanors rather than "unfair

labor practices," and, therefore, the pickets in those cases were subject to criminal penalties, there is sufficient basis for distinction in the instant case. We fail to see how the distinction justifies the legislation.

In the instant case the commission of an unfair labor practice subjects the person to more stringent punishment than the commission of the misdemeanor in the **Carlson** or **Thornhill** cases. Upon the commission of a misdemeanor one is subject to fine and imprisonment. In each case, the penalty exacted by the law is commensurate with the magnitude of th offense.

Under the Wiscon a statute if one commits an "unfair labor practice" by peacefully exercising the right of free speech assured by the Constitution of the United States, one is subject to complete and perpetual restraint from ever exercising again that right of free speech unless he subsequently is licensed by the majority to do so. The right to picket and to boycott, identified with free speech in the **Thornhill** case, are denied to the appellants in the instant case under the decision of the Wisconsin Court.

Further than that, as a result of being found guilty of unfair labor practices, employees lose their status of employees under the act and are consequently deprived of the rights, privileges and immunities afforded by the act to other employees [sec. 111.02 (3) and 111.97 (4)]. Gone is the right to vote, participate in the designation of representatives, and to be protected from discharge because of union activity or affiliation. The Wisconsin Supreme Court in its decision expressly stated that when it is found that any person has committed an unfair labor practice under the Wisconsin law such person loses the benefits of Section 103.53, Stats. 1939 (some of which provisions are set forth herein at page 53) and loses the status of employee as well as the rights, immunities, privileges or

remedies granted or afforded by chapter 111. Here then, under the holding of the Wisconsin court, we do not have merely the attachment of a stigma that one has committed an unfair labor practice but a deprivation of the status of employe, a cancellation of any rights which one may have as an employee, and a complete prohibition on the exercise of constitutional rights.

In our minds, and we venture to say in the minds of the justices of this court, that type of penalty is more burdensome and more severe than any fine or imprisonment could possibly be.

What the Wisconsin court has said in this attempted distinction between unfair labor practices and unlawful acts is that the State may not fine or imprison one for exercising the right of free speech, but the State may prohibit one from continuing to exercise that right. Certainly the latter is at the very least as reprehensible as the former.

The Board Order Constitutes a Restraint on the Exercise of Constitutional Rights, Even Though Not Self-Executing.

In line with the foregoing is the argument of the Wisconsin court that the Peace Act is not self-operative; that violators merely commit unfair practices; that the statute itself does not subject them to fine or imprisonment. No further answer is necessary other than to point out that upon failure of any individual to obey an order of the Board, the Board is empowered to obtain an order from the Circuit Court enforcing its order, and that the order of the Circuit Court is enforceable by contempt proceedings which may involve fine or imprisonment. It is the mere threat or fear of subsequent punishment because of the doing of a lawful act, or the exercise of a constitu-

tional right, such as the right to free speech, which abridges or diminishes the free or effective exercise of that right. The constitutional right to freedom of speech is not one which can freely be exercised when there is a continuing threat that, if exercised, the person exercising the right will be subjected to court proceedings, contempt orders, and fine or imprisonment. As was said by this Court, "The freedom of speech and of the press, guaranteed by the Constitution, embraces at the least the liberty to discuss publicly or truthfully all matters of public concern **without previous restraint or fear of subsequent punishment.**" (**Thornhill** case.)

If, as stated by this Court in the **Thornhill** case:

> "Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society,"

then that right must be exercised without the restraint of a Board order.

4. The Term "Picketing," as Used in the Thornhill Case, as Distinguished From That Term as It Is Used in Section 111.06 (a) (e).

The greatest difficulty we have had with the decision of the Wisconsin Supreme Court is its attempted distinction between the term "picketing," as used in the **Thornhill** case, and the term "picketing," as used in section 111.06 (2) (e), with the ultimate mandate of the Court that the order be affirmed in its entirety without modification. The Wisconsin Court states:

> "The term 'picketing,' as used in subsection (e), does not include acts held in the **Thornhill** case to be within the protection of the constitutional guaranty of the right of free speech."

We assume from this statement that we have a right, then, to look to the **Thornhill** case for the purpose of determining what activities were included within the term "picketing" in that case.

In the **Thornhill** case the statute prohibited "loitering or picketing * * * for the purpose or with the intent of influencing or inducing other persons not to trade with, buy from, sell to, and have business dealings with or be employed by such persons, firm, corporation, or association * * *"

The United States Supreme Court stated:

> **"The range of activities prescribed by section 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern."**

Using the Wisconsin Court's own test, the term "picketing," as used in section 111.06 (2) (e), should not, therefore, include "nearly every practicable, effective means whereby those interested * * * may enlighten the public on the nature and causes of a labor dispute."

Yet the order of the Board in the instant case, as affirmed by the Wisconsin Court, prohibits these appellants, and each of them, from engaging in, promoting, or inducing picketing at or near the Plankinton House or the Kilbourn Hotel, and from boycotting in any way the Plankinton House Company. Certainly this order proscribes every conceivable affective means which labor organizations and employees have of advising the public about their particular dispute with the employer or with the employees of the employer.

Further than that, the state court has ignored the caveat of the **Thornhill** decision that the statute must be tested on its face. Section 111.06 (2) (e) includes the prohibition against "any other overt concomitant of a strike." Does not the statute then prohibit, and has not the order of the Board prohibited, those activities which in the **Thornhill** case were included within the term "picketing"?

The order, on the face of it, is all-inclusive, and refers to all boycotting and all picketing, no matter how carried on, in what circumstances, or through what medium. It cannot be supported under any theory of law.

5. "Authorized" as Distinguished From "Unauthorized" Strikes.

The conflict between the Court's division of strikes into "authorized" and "unauthorized," and the results which flow therefrom, and the decision of this Court in the **Thornhill** and **Carlson** cases, as well as in the cases of **Snyder v. Milwaukee**, 308 U. S. 148, and **Lovell v. City of Griffin**, 303 U. S. 444, can be more graphically demonstrated if we substitute the word "license" for the word "authorized." The two are synonymous.

Using the term "licensed" we have the Wisconsin Court stating that we may have licensed and unlicensed strikes; that in the unlicensed strike the employer-employee relationship is terminated, and the third party (ex-employee) has lost the right to engage in free speech. The "licensing" is all-controlling.

Yet this Court stated in the case of **Lovell v. City of Griffin**, 304 U. S. 444, that the right of free speech is absolute, and is not subject to license. In **Snyder v. Milwaukee**, 308 U. S. 141, it was stated that the right of free speech is absolute, and not subject to prohibition under the purported exercise of the police power. In the **Thorn-**

hill, Carlson and **Swing** cases the right to inform the world by picketing, by placard, by pamphlet, or radio, or by word of mouth about the fact surrounding the employment relationship or the employment conditions, regardless of whether or not the person who is informing the world is an employee or third party, was held not subject to restraint by a municipality or state.

Therefore, whether a strike is "authorized" or not, and regardless of whether there is a strike or not, the right of employees or non-employees to publicize the true facts surrounding the employment relationship may not properly be made subject to the granting of a license by a majority of the employees.

THE LEGISLATURE MAY NOT BY THE "UNAUTHORIZED STRIKE" DEVICE PROHIBIT OR RESTRAIN THE EXERCISE OF CONSTITUTIONAL RIGHTS.

The Legislature cannot by the adoption of artificial devices prevent or prohibit the exercise of constitutional rights. For instance, it could not classify literature as pornographic when in truth and in fact it is not pornographic, and by such device prohibit the distribution of such literature. Similarly, it cannot classify as immoral, religious practices which are in truth and in fact not immoral, and thereby prohibit the exercise of the right to religious worship.

Similarly, it cannot, as it has done in the instant case, classify certain strikes as illegal, and by that means prohibit and prevent the exercise of free speech in furtherance of such strike when there is nothing innately illegal or reprehensible about such strike or such activities. See **United States v. Carolene Products Company**, 304 U. S. 144, 82 L. Ed. 1234, holding:

"We may assume for present purposes that no pro-

> nouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis."

To forbid picketing or boycotting because in aid of an unauthorized strike is to make such picketing and boycotting depend upon "authorization" for the strike. Authorization for the strike comes only by a secret ballot in which a majority vote in favor thereof. When this majority has **licensed** a strike the exercise of free speech is permitted. **When this majority refuses to license the strike the exercise of the constitutional right is prohibited.** What the majority does then is act as a licensor of the right to exercise constitutional rights. This is directly contrary to the decision of this Court in the **Lovell** case, 303 U. S. 444, wherein it was stated:

> "The struggle for the freedom of the press was primarily directed against the power of the licensor * * * and the liberty of the press became initially a right to publish "**without** a license what formerly could be published only **with one.**' * * * Legislation of the type of the ordinance in question would restore the system of license and censorship in the boldest form."

CLASSIFICATION OF "AUTHORIZED" AND "UNAUTHORIZED" STRIKE BEARS NO RELATIONSHIP TO THE POLICE POWERS.

This also raises the question of whether the circumstances in an "unauthorized" strike situation, as defined by the Legislature, are such as to reasonably permit a presumption that imminent and actual danger to life and property is inherent in all picketing in such situation. It

must be remembered that the **Thornhill** case states that it is only in certain situations that the prohibiting of picketing may be constitutional. It is stated:

> "Abridgment of the liberty of such discussion can be justified only where the **clear danger of substantive evils arises** under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."
>
> * * * * * * *
>
> "But no **clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace** can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare **American Foundries v. Tri-City Council**, 257 U. S. 184, 205. Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern." (Emphasis ours.)

Directly pertinent is the statement in the **Thornhill** case that "we hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in section 3448."

We fail to see how the classification of strikes into "authorized" and "unauthorized" can be validly squared with the above pronouncements.

THE WISCONSIN COURT'S USE OF THE TERM "COERCION" IS INEXACT AND INACCURATE. THE UNITED STATES SUPREME COURT HAS DECLARED IDENTICAL CONDUCT TO CONSTITUTE THE EXERCISE OF FREE SPEECH.

In numerous places throughout the decision the state court uses the term "coercion." When such term is used in connection with acts of violence disturbances and breaches of the peace there can be no dispute with such use. When, however, the term is used in connection with otherwise peaceful activities then that court has fallen into the error of being guided by distasteful terms rather than by reality.

In its decision the Court points out that a minority group may withdraw from employment, either singly or in concert, without running afoul of the law, but "if they attempt to **coerce** their employer by concerted picketing, a boycott, or by any other similar overt concomitant of a strike, they will be found guilty of an unfair labor practice as defined in the act." (Emphasis ours.)

We gather from the use of the term "coerce" in the above respect that the Wisconsin court classified picketing, boycotting, or any other similar overt concomitant of a strike as being coercive per se. Either that, or the Court has said that such action by a minority group constitutes coercion, while such action when "licensed" or "authorized" by a majority group does not constitute coercion. We reject the latter interpretation, since in the opinion the Court speaks of the employees' "right to coerce," and further states that "the act limits the use of coercive measures." From this we must assume that the Court considers all of such actions coercive.

It would seem that the state court subscribes to the philosophy that peaceful persuasion and statement of truths is coercive in that its tendency may be to prohibit

the continuance of those actions which prompt the persuasion.

Even if we are to assume that the Wisconsin court is correct when it labels peaceful activities with the opprobrious epithet of "coercion," such labeling cannot, nevertheless, permit restraint of such actions if such actions are assured by the Constitution of the United States.

The **Thornhill** and **Carlson** cases, together with the **Schneider** and **Hague** cases, have so conclusively identified the normal peaceful activities of labor organizations with the right of free speech that the Wisconsin Court cannot in any way distinguish such decisions in a fair and proper manner.

In the **Thornhill** and **Carlson** cases specifically the actions therein identified as being synonymous with free speech were the **concerted activities** of members of labor organizations, directed toward the legitimate objectives for which such labor organizations were formed. The conduct complained of constituted picketing, patrolling, and advertising. The conduct condemned by the statute in those cases was picketing, patrolling, and advertising. The decisions of the United States Supreme Court in those cases are so clear that it comes with unbelievable shock that the Wisconsin Court should seek to distinguish such cases by calling in this case "coercion" what is called in those cases "free speech."

Apparently the entire decision of the Court rested upon the fallacious concept that those activities enumerated in section 103.53 of the Wisconsin statutes (the State Norris-La Guardia Act) are coercive in nature, and, therefore, subject to complete restraint by the Legislature unless under certain circumstances the Legislature sees fit to permit such coercive conduct. The acts which are enumerated in section 103.53 of the statutes are not privileges granted

by the Legislature. **Senn v. Tile Layers' Union**, 301 U. S. 468. They constitute the exercise of the right of free speech as set forth and defined in the **Senn, Thornhill** and **Carlson** cases.

As was specficially stated by Justice Brandeis in the **Senn** case:

> "Members of a union might, **without special statutory authorization by a state**, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." (Emphasis ours.)

Sections 103.53 (1) (e) (g) (h) (j) and (l), for instance, are exactly the type of acts which are referred to and discussed in the **Thornhill** and **Carlson** cases. **The Wisconsin Legislature itself recognized that the acts enumerated in such sections are not in and of themselves coercive, since it set forth in connection with those acts the caveat that such acts be not accompanied by intimidation or coercion** [Section 103.53 (1) (e)].

Under the state court's misapprehension that peaceful activities of labor organizations are coercive, so must every other utterance in an election campaign, in the legislative chamber, and before this very court, be deemed coercive. Every defense of rights, every criticism of wrongs, every expression of opinion, every exhortation, every endeavor to gain by peaceful means the co-operation and support of fellow citizens is coercive and subject to restraint under the characterization of the Wisconsin court.

The Fallacy in the Court's "Majority Rule" Argument.

The argument of the state court with respect to the majority rule completely discloses the failure of that court to distinguish between the majority rule when used

for the designation or election of representatives, and the majority rule when used **to prohibit the exercise of the right of free speech.**

The majority of the people of the United States on November 5, 1940, designated Franklin D. Roosevelt as President of the United States. A minority, numbering over 20,000,000, had desired Mr. Wendell Willkie as its representative. Although the election resulted adversely to the wishes and desires of these 20,000,000, these 20,000,000 and their candidate remain free to express their dissatisfaction with the results and to criticize the practices and policies of the elected administration for the next four years.

We know of no court in this country that has ever held the constitutonal guarantees lost to citizens of a state by virtue of the fact that they comprise a minority. We believe section 111.06 (2) (e), the order based thereon, and the decision of the Wisconsin court affirming such order, are every bit as reprehensible as would be a law which provides that all those who voted for Wendell Willkie are forbidden for the next four years from continuing their allegiance to him by speech, by placard, by pamphlet, or by any other device through which freedom of speech is exercised.

The distinction between the election of a representative by a majority and the right of the minority, although bound by the results of the election, to continue the exercise of their constitutional guarantees, is the very basis of our democracy. Were it otherwise there could be only one election in any democracy. It would be manifestly impossible and absurd to have any other elections, other than the first one, if after the first one the right to protest, the right to discuss, the right to exhort, and the right to persuade others to come to their cause, is forbidden to the minority.

When the Wisconsin Court says in effect that if a majority of the employees are willing to continue under intolerable working conditions, oppressive wages, or killing hours, that is their own misfortune, and that has been brought on by their own docility, it certainly provides no balm to those who refuse to be bound by such docility. Certainly in this country an individual or group of individuals must still have the right to protect and to seek support in their crusade, even though others are not aroused. Certainly in this country we have not reached the point where the crusader is deprived of his armor and sword, never to crusade again, solely because a majority are not convinced of the merits of the crusade.

Yet the Wisconsin Court says that labor is not to be alarmed because of the oppressive legislation, and says:

> "* * * No group within the body politic has shown itself more willing to stand upon its rights and sacrifice present advantage for future benefits than has labor."

Labor has fought persistently for its self-betterment. But such commendation means nothing when it is embodied in a decision which takes away from labor the only effective way it has of carrying on its purposes. What device is left to labor? What means can it adopt? How can it protect itself if its rights to appeal to the public, to persuade fellow employees, and to advertise the facts and circumstances of a labor controversy, are taken from it? What device can it use in its defense? What does the Wisconsin Court give to labor in its crusade for better hours, wages, and working conditions when it tells labor it may not picket, it may not advertise, it may not boycott, it may not express its opinions and its views, and it may not exercise the rights guaranteed by the Constitution of the United States because a majority of the em-

ployees working for a particular employer has not licensed, authorized, or permitted them to do so?

There are many who, if informed of the circumstances surrounding the employment relationship of the Plankinton and Kilbourn Hotels, will not patronize such hotels. There are many people who do not patronize an employer if aware that only an employee considers himself abused. There are hundreds of thousands of people who would not patronize any employer, even though all employees are apparently satisfied, if such employer's labor policy is such that competing employers cannot successfully compete unless they too engage in oppressive labor practices.

Under the decision of the Wisconsin Court, how are these people to know whether their hard-earned money is being used to support those who are not deserving of such support? Under the decision of the Court, how are fellow union members—fellow members in all affiliated organizations—to know that the Plankinton and Kilbourn Hotels have no labor agreement with the appellant unions, and, therefore, are not entitled to their patronage and their custom?

It is very well for the Wisconsin Court to state that none should have fear that labor will be servile, docile, or moribund, but if that fear did not exist before the rendition of this opinion it certainly must exist now under the decision of the Court. What other alternative does the state court grant to a minority group which is prohibited the right of freely expressing its opinion, and prohibited the right of peacefully conveying the truth of its difficulties to the public?

The United States Supreme Court in the **Thornhill** case supplies a complete answer to the argument of this Court that the rule of the majority must govern:

"But the group in power at any moment may not

impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests."

VI.

MEMORANDUM OPINION ON THE MOTION FOR REHEARING.

On the motion for rehearing the Court rendered another opinion (Supp. R. 69-7.). In that opinion the Court seeks to disregard all of the previous utterances in the original opinion, and indicates that its decision is based upon the purported acts of violence, and that section 111.06 (2) (e), regardless of its plain and obvious terms, is directed only to acts of violence. The opinion on the motion for rehearing, therefore, served only to further confuse what was already a confused and indefensible opinion.

It is now argued by the respondents that what the Wisconsin court did on the motion for rehearing was to anticipate the holding of the United States Supreme Court in the **Meadowmoor** case. We have already pointed out that the record will not support such holding.

Furthermore, it must be apparent from the reading of the decisions of the Wisconsin Supreme Court (and we refer also to its subsequent decisions in the cases of **Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers and Dairy Employees' Union, Local 225 etc.**, 299 N. W. 31, and **Carpenter Baking Company v. Bakery Sales Drivers Local Union No. 344 et al.**, 299 N. W. 30, and 300 N. W. 235 [decision on motion for rehearing], set forth in the appendix to our reply brief on the petition for certiorari) that organized labor and working men in the State of Wisconsin had been deprived of those rights assured to them under the Fourteenth Amendment to the Consti-

tution of the United States by the arbitrary device employed by the Wisconsin Legislature and upheld by the Wisconsin court.

Additionally, the subsequent decisions of the Wisconsin Supreme Court afore referred to, particularly the **Carpenter Baking Company** case, demonstrate clearly that it is the first opinion of the Wisconsin Supreme Court in the instant case, which has become the controlling law in the state, since in the **Carpenter Baking Company** case there was absolutely no violence of any kind, yet the Court sustained an injunction which prohibited all peaceful activities which were designed to persuade persons not to deal with the employer, with the employer's products or with retail dealers which offered the employer's products for sale. On the motion for rehearing in the **Carpenter Baking Company** case, the Wisconsin court sought to place its decision on a question of fact rather than on a question of law, despite the stipulated fact that there was no violence.

It is, therefore, obvious that only a clear unequivocal statement from this Court will serve to preserve the constitutional rights of working men in the State of Wisconsin.

CONCLUSION.

The single issue involved in this case is whether or not the State of Wisconsin, either through its Legislature, its administrative boards, or its courts, may deny to these petitioners and all others similarly situated those rights assured to them by the Fourteenth Amendment to the Constitution of the United States, which include the right to peacefully picket, boycott, and engage in the usual overt concomitants of a strike. There is no issue in this case of whether or not the State of Wisconsin has the

right to prohibit violence or disorder, nor is there any issue in this case concerning any purported legality of objective sought to be obtained by a labor organization.

The previous decisions of this Court, as cited in our brief, should have made appeal to this Court unnecessary. In view of the complete and utter disregard of those decisions, however, the Wisconsin Court has denied to these petitioners the constitutional rights afore referred to.

It is, therefore, respectfully submitted that the decision of the Court upholding and affirming the Board's order and upholding the validity of the provisions of the so-called Employment Peace Act discussed in this brief as being constitutional legislative enactments is erroneous and should be reversed.

Respectfully submitted,

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